IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE R.BASANT

TUESDAY, THE 27TH FEBRUARY 2007 / 8TH PHALGUNA 1928

Crl.MC.No. 284 of 2007()

CRA.48/2007 of ADDL.SESSIONS COURT,-I, MAVELIKKARA

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PETITIONER:

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1. SULOCHANA, AGED 46 YEARS,
   ASHA BHAVANAM, PADANILAM MURI, NOORANADU VILLAGE,
   MAVELIKKARA, NOW RESIDING AT MUKALUPARAMPIL,
   PATTOOR, PADANILAM.

2. PARVATHY, MINOR AGED 12 YEARS,
   REPRESENTED BY THE 1ST PETITIONER - MOTHER.

BY ADV. SRI.R.PADMAKUMAR

RESPONDENTS:

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1. KUTTAPPAN,
   ASHA BHAVANAM, PADANILAM MURI, NOORANADU VILLAGE,
   MAVELIKKARA.

2. ASHA, W/O. DHARMADAS,
   VILAYASSERIL, KANDALLOOR NORTH, KANDALLOOR.

3. SEEMA, W/O. R. PRASAD,
   BHAVTHY PARAMPIL, CHEMMATTUKARA, VAIKOM.

4. STATE OF KERALA,
   REP. BY PUBLIC PROSECUTOR, HIGH COURT OF KERALA,
   ERNAKULAM.

BY PUBLIC PROSECUTOR SRI.GIKKU JACOB
SRI.RINNY STEPHEN
SMT.ASHA ELIZABETH MATHEW

THIS CRIMINAL MISC. CASE HAVING BEEN FINALLY HEARD ON 27/02/2007, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

R.BASANT, J

Crl.M.C.No.284 of 2007

Dated this the 27th day of February, 2007

ORDER

Is an appeal maintainable under Section 29 of the Protection of Women from Domestic Violence Act, 2005 (hereinafter referred to as `the Act") against an interim exparte order passed under Section 23 of the Act ? This crucial question is to be decided in this Crl.M.C. The parties are being referred to in this order in the manner in which they are ranked before the learned Magistrate.

2. The petitioners - mother and her child, had approached the learned Magistrate with an application under Section 12 of the Act claiming relief under Section 19 and 20 of the Act. The learned Magistrate passed an exparte interim order, copy of which is produced as Annexure-4, directing the 1st respondent/alleged husband to allow the petitioners to reside in his house and restraining him from causing any disturbance to the peaceful residence of the petitioners in that house. There was also a further exparte interim direction that the 1st respondent must pay an amount of Rs.2,000/- and Rs.1,250/- per mensem to petitioners 1 and 2 respectively. That order was passed on 01.01.2007. The respondents thereupon rushed to the Sessions Court and the Sessions Court after admitting the appeal granted an interim

stay. Copy of that order is produced as Annexure-6. The order of the Magistrate was suspended on condition that the petitioner shall execute a bond for Rs.5,000/- with two solvent sureties each for the like sum to the satisfaction of the court below within a period of one month from the date of the said order.

3. The learned counsel for the petitioners contends that no appeal under Section 29 is at all maintainable against an interim exparte order passed under Section 23. In these circumstances, he contends that the entertainment of the appeal by the learned Sessions Judge is not legal and justified.

4. The learned counsel for the petitioners further contends that at any rate, the insensitive manner in which the order of suspension/stay (Annexure-6) was granted, is objectionable and the learned Sessions Judge did not apply his mind to the nature of the relief that was granted to the petitioners or the contentions of the parties before the said blanket order of suspension was granted.

5. The contentions call for a detailed consideration of the provisions of Section 29 of the Act. It will be apposite in this context to refer to the scheme of the Act. Reference to the Statement of Objects and Reasons of the Act clearly show that the Act is a piece of civil law conferring on the victim women civil rights. Provision is also made for the redressal of their grievances through the structure

provided under the criminal law. It will be apposite to alertly note that the Act is a piece of civil law which is sought to be implemented through the instrumentality of the courts constituted under the Code of Criminal Procedure. The only penal provision in the Statute against a party - respondent is the one in Section 31 of the Act. Chapter 1 containing Sections 1 and 2 deals only with the short title, extent and commencement and the definitions. Shared household is defined in Section 2(s) and domestic violence is defined in Section 2(g) read with Section 3 of the Act. Chapter 2 has only one Section and that (S.3) deals with the definition of the expression `domestic violence'. Chapter 3 containing Sections 4 to 11 deals with the procedure for appointment of protection officers, service providers etc. and their powers and duties. Chapter 4 containing Section 12 to 29 deals with the reliefs that can be granted and the orders that can be passed and the procedure to be followed by the Magistrate before passing orders granting such relief. The provision for appeal against such orders are available in Section 29. Chapter 5 deals with miscellaneous provisions.

6. We are particularly concerned with Chapter 4. The nature of the orders that can be passed are enumerated in Section 18 - which deals with protection orders, Section 19 - which deals with residence orders, Section 20 - which deals with monetary relief, Section 21 - which deals with custody orders and Section 22 - which deals with

compensation orders. Sections 18 to 22 deal with final orders that can be passed.

7. The legislature was evidently aware of the need in an appropriate case to pass interim and exparte orders. Power to pass interim and exparte orders are mentioned in Section 23 of the Act. Relief may be claimed under Section 18 to 22, but before final orders are passed under Sections 18 to 22, Section 23 clothes the Magistrate with power to grant interim orders. Such interim orders can be granted exparte also.

8. Section 24 deals with the manner in which copies of orders are to be furnished free of cost. Section 25 deals with the duration of the orders and the procedure for alteration of orders passed. It evidently deals with the duration and alteration, modification or vacation of final orders that may be passed under Section 18 to 22 of the Act. It does not according to me, deal specifically with alteration, modification or vacation of interim orders passed under Section 23 of the Act. Section 26 deals with reliefs in other suits and legal proceedings and Section 27 deals with the territorial jurisdiction of the Magistrates who exercise powers under the Act. Section 28 deals with the procedure which the Magistrates have to follow and the stipulation in Section 28(1) is that the procedure shall be governed by the Code of Criminal Procedure. Of course, in Section 28(2), it is further stipulated

that the Magistrate can lay down his own procedure for disposal of application under Section 12 or under Section 23(2) of the Act.

9. It is thereafter as the last Section of Chapter 4 that Section 29 dealing with the provisions relating to appeal appears. I extract Section 29 below:

> Section 29: Appeal: There shall lie an appeal to the Court of Session within thirty days from the date on which the order made by the Magistrate is served on the aggrieved person or the respondent, as the case may be, whichever is later.
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> (emphasis supplied)

10. The crucial question to be decided is whether an appeal under Section 29 of the Act is maintainable against all orders referred to earlier in the Chapter ie. from Section 18 to 23 or whether the provision for appeal is limited to final orders passed under Sections 18 to 22 only. That appeals are maintainable against all final orders under Section 18 to 22 is not disputed. The short question is whether appeal is maintainable against an interim order/an exparte order passed under Section 23 of the Act.

11. Section 23 reads as follows:

> **Section 23. Power to grant interim and ex parte orders** - (1) In any proceeding before him under this Act, the Magistrate may pass such interim order as he deems just and proper.

> (2) If the Magistrate is satisfied that an application prima facie discloses that the respondent is committing, or has committed an act of domestic violence or that there is a likelihood that the respondent may commit an act of domestic violence, he may grant an ex parte order on **the basis of the affidavit in such form**, as may be prescribed, of the aggrieved person under Section 18, Section 19, Section 20, Section 21 or, as the case may be, Section 22 against the respondent.
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> (emphasis supplied)

12. Section 29 speaks of appeals. It implies that appeal is maintainable against `the order'. To construe the ambit of the expression `the order' in Section 29 of the Act, it will first be necessary to consider the plain language of the statutory provision. It speaks of an appeal against the order. The definite article `the' used in Section 29 must certainly have reference to the orders referred earlier. Otherwise, the employment of the definite article `the' would lose its significance. All orders referred to earlier in Chapter 4 of the statute must be held to be fall within the sweep of expression `the order' as there is no other or better method of understanding the definite article `the' used immediately before the expression `order' in Section 29 of the Act. Therefore going by the plain language of Section 29, I have no hesitation to agree that the expression `the order' must take within its sweep all orders passed under Section 18 to 23 and I find no reason to exclude, going by language and semantics,

an order passed under Section 23 from the sweep of the expression `the order' in Section 29.

13. The learned counsel for the petitioners contends that while understanding the expression `the order', a distinction must be made between final orders passed under Section 18 to 22 in contradistinction to interim orders passed under Section 23 of the Act. The counsel contends that the purpose of the Act, the class of persons/target group to whom relief is sought to be granted under the Act, the sense of expedition which must inform all authorities dealing with proceedings under the Act as reflected in Section 12(4), 12(5) and 13 must all be borne in mind while considering the sweep of expression `the order'. He also contends that if two views are possible, the one in favour of the target group - the class of persons (victim women in this case) for whom benefit is sought to be conferred under the humane provisions of the Act, cannot be lost sight of.

14. Purely interlocutory orders which deal only with procedure and which do not affect the rights of parties will certainly not fall within the sweep of the expression `the order' in Section 29. Any and every order under Chapter 4 of the Act may not fall within the sweep of expression `the order' in Section 29. The order has to affect or have a material reflection on the rights of parties in order that such orders would be appealable. It is true that Section 23 does not exclude

interlocutory orders specifically from the sweep of expression `the order'. But even without such a specific exclusion [as found in provisions of Section 19(1) of the Family Courts Act, Section 397(2) of the Cr.P.C, Section 14 of the Terrorist Affected Areas Special Courts Act, 1984, Section 19 of the Terrorist and Disruptive Activities Prevention Act, 1987 and many other enactments], in Section 23 of the Act it has to be held that purely interlocutory orders which do not affect the rights of parties shall not be appealable.

15. It is not necessary to look for specific exclusion in such a provision stipulating the right of appeal to exclude from it purely procedural orders. Notwithstanding the fact that Section 29 does not specifically exclude interlocutory orders, it is easy to come to the conclusion that Section 29 does not contemplate a challenge in appeal against orders which are purely procedural in nature. It will not be inapposite in this context to note that the legislature has not thought it fit to specifically exclude even such interlocutory orders from the play of Section 23. But however, even in the absence of such specific exclusion, purely procedural orders which are only steps in aid for the final disposal of an application under Section 12 claiming reliefs under Section 18 to 22, can be excluded from the sweep of the expression `the order' in Section 29. What is important to note is that the legislature has not thought it fit to exclude even such purely

procedural orders from the sweep of Section 29 by employing specific words to that effect. Such a restriction can certainly be inferred from the purpose of the provision for appeal as also from the interpretation of similar and identical provisions in **Sumathi v. Devasan** [1991(1) KLT 453], **Sidharthan v. Hassankutty Haji** [1994 (2) KLT 419].

16. The learned counsel for the petitioner contends that such interim orders under Section 23 which are interim to the final orders which may be passed under Section 18 to 22 cannot be held to affect the rights of parties substantially as to be the subject matter of an appeal under Section 29. I am unable to accept this contention at all. A reference to the provisions of Sections 18 to 22 clearly shows that interim orders under Sections 18 to 22, though not final in nature and though they may hold the field only till final orders are passed, will also affect the rights of parties substantially. It is not necessary to advert to the nature of the interim reliefs that can be granted by a Court under Section 23 read with Section 18 to 22. But it is very evident that an interim protection order, an interim residence order, an interim monetary order, an interim custody order or an interim compensation order under Section 18 to 22 will also substantially affect the rights of parties at least till such orders are altered or modified. Section 31 makes it clear that breach of an interim protection order may expose the respondent to even imprisonment for

a period of one year and fine. In this view of the matter, I am unable to agree that interim orders under Section 23 must be held to be not amenable to the appellate jurisdiction under Section 29 for the reason that such interim orders would be purely interlocutory (procedural) orders which would not affect the rights of parties at all or substantially.

17. The learned counsel for the respondents contends that a person who has suffered an exparte interim order under Section 23 can always go before the Magistrate and request for modification/vacation of the interim order or not to extend the interim order. That course is certainly available to a person who has suffered an exparte interim order under Section 23. But the mere fact that such a course is available to him cannot at all persuade the Court to hold that such an interim order will be beyond the purview of Section 29 and no such appeal would at all be maintainable. In this context, I again look at the possible interim orders that can be passed under Section 23 read with Section 18 to 22. I have no hesitation to agree that such interim orders passed under Section 23 read with Section 18 to 22 would affect the rights of parties substantially and provisions for appeal under Section 29 will be available against such orders also.

18. The question as to how a stipulation for appeal should be interpreted and the cannons of interpretation which must apply while

interpreting provisions relating to right of appeal has been considered by this Court in many decisions. Right of appeal is often reckoned as the minimum procedural safeguard against error, arbitrariness and unreasonableness. In **Shahul Hameed v. R.T.A., Palghat** [1987 (2) KLT 620], **Muhammed v. Koyammu Haji** [1989 (1) KLT 317], **Vamanan Nambudiri v. N.Kurup** [1964 KLT 516 (F.B)], this Court had emphasised "the need for liberality" while considering provisions relating to the right of appeal. Section 29 of the Act is also entitled to such liberality while attempting to interpret the same and ascertaining the width and amplitude of the expression `the order' in Section 29.

19. Whether an interlocutory order will be appealable was also considered by this Court in several decisions under Order 43 Rule 1(r). The decisions in **Bhaskaran v. Ambika** [1977 KLT 476], **Alice v. Thommen** [1983 KLT 97] and **V.T.Thomas v. Malayala Manorama Co.Ltd.** [1988 (1) KLT 433] have considered this aspect in detail and this Court had come to the conclusion that even an interim exparte order under Order 39 Rule 1 would be appealable. The Supreme Court in **A.Venkatasubbiah v. S.Chellappan** [A.I.R 2000 S.C 3032] has also affirmed that an exparte interim injunction does also fall within the sweep of appealable orders under order 43 Rule 1. There can hence be no possible challenge that an interim exparte order is not appealable by its very nature.

20. What remains to be considered is the contention that such a wider understanding of the sweep of Section 29 would contribute to the delay in the disposal of applications under Chapter 4 and may in turn defeat the mandate of expedition in Section 12(4) and 12(5). I am unable to accept this contention at all. The mere fact that an appeal is preferred against an interim order need not necessarily retard the progress of disposal of applications under Section 18 to 22. It will be wrong to assume that the right to appeal against an interlocutory order would necessarily entail delay in the disposal of the applications under Chapter 4. Nor am I impressed with the contention that such an understanding of the sweep of Section 29 would be detrimental to the target group to whom the Act endeavours to do justice - viz. the victim women. The right of appeal would be available to such victim women also in case an order under Section 23 is not passed in their favour. Therefore it would be incorrect to interpret the expression `the order' in Section 29 based on any theory of possible retardation of progress in the disposal of applications under Chapter 4 or on the argument that such right of appeal would be detrimental to the interests of the target group.

21. The counsel for the petitioners raises a further contention that under Section 12(4) normally an exparte interim order will have a life of only 3 days and it is not necessary in these circumstances to

confer on a person who has suffered an exparte interim order with a right to appeal under Section 29. I am unable to accept this contention. Of course, under Section 12(4), the first date of hearing must be within 3 days of the date on which the court passes the order. But the exparte interim order may live longer. Moreover in a case depending on the place where the respondent is , the date of first hearing may suitably be fixed on a later date and in such event also, the period of life of the interim order may be longer. The mere fact that the respondent who has suffered the interim order can go to the Magistrate seeking modification of the order passed under Section 23 and can secure an order with expedition is also according to me no ground to interpret Section 29 to exclude any right of appeal against an interim order under Section 23.

22. I have no hesitation to agree with the learned counsel for the petitioner that ordinarily and normally a person who has suffered the order would do well to appear before the learned Magistrate and pray for modification/vacation of the interim order or not to extend the interim order passed under Section 23. A court considering the entertainment of an appeal against an interim exparte order under Section 29 will certainly be conscious of this fact - that the aggrieved persons can approach the Magistrate who passed the interim order and seek its variation under Section 23 read with Section 28(2) of the Act.

A Court considering admission of an appeal under Section 29 must always remind itself of the fact that such a course/remedy is available to the aggrieved person and as a reasonably prudent person, a Court will certainly look for answers as to why without and before exhausting that remedy resort is made to the provisions under Section 29 to prefer an appeal. But that is not to say that an appeal is not maintainable. Only in an appropriate case need the powers under Section 29 be invoked and the appeal entertained. That discretion vests with the appellate court. But the jurisdiction or the competence to entertain an appeal cannot be doubted.

23. The learned counsel for the petitioners further submits that an order of stay has been granted without due and proper application of mind. I find force in this submission. The court had not even referred to the contentions of the parties. The nature of the order of suspension passed also reveals that there has been no due and proper application of mind. In the same manner in which a sentence is suspended, an order of suspension has been passed also. An appellate court considering the admission of an appeal and considering grant of stay against the interim orders appealed against, must certainly and alertly consider all the circumstances and then only grant interim orders of suspension. Not to do so, would be to do violence to the statutory rationale underlying a welfare statute enacted by the

Parliament. I am in agreement with the learned counsel for the petitioner that great care and caution must be applied before granting exparte orders of suspension/stay in appeals preferred under Section 29 of the Act.

24. The appeal was admitted on 19.01.2007 and remains without disposal even now, it is submitted. I must caution the appellate courts of the need to dispose of appeals under Section 29 - more so when the order challenged is an interim exparte order under Section 23, with great expedition and urgency. I am disappointed to note that the appeal is pending even now. I am satisfied that the learned Sessions Judge can be directed to dispose of the appeal as expeditiously as possible - at any rate, within a period of 15 days from 15.03.2007, on which date both parties/their counsel shall appear before the learned Sessions Judge and if the appeal is not posted for hearing to that date, the learned Sessions Judge shall advance hearing of the appeal to that date for consideration.

25. It may not inapposite in this context to remind the Magistrates also of the great responsibility on them while considering grant of interim exparte orders under Section 23 of the Act. The nature of the possible orders under Section 18 to 22 and the interim orders that can be passed by invocation of such powers under Section 23 must instill in the mind of the Magistrate the concomitant degree of

care and caution which is necessary before passing exparte interim orders under Section 23 read with Section 18 to 22. In cases where existence of matrimony is disputed etc., alert application of mind will certainly be required before such exparte interim orders are passed. I need only mention that the Magistrates must be conscious of the repercussions and ramifications of such exparte interim orders which may be passed under Section 23 of the Act.

26. This Crl.M.C is, in these circumstances, dismissed, but with the specific directions given above to the learned Sessions Judge for expeditious disposal of the appeal.

(R.BASANT, JUDGE)

rtr/-